Supreme Court, U.S.
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No. 87-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH G. BUDINICH,

Petitioner,

v.

BECTON DICKINSON AND COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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September, 1987

QUESTIONS PRESENTED

1. Whether the time in which to appeal a judgment of the federal district court is governed by federal law and procedure?

2. Whether an appeal from a final judgment on the merits of an action is untimely when it is not filed within the time set by the Federal Rules of Appellate Procedure, where an order taxing attorneys fees as costs of the action is pending?

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Becton Dickinson and Company, respectfully requests that this court deny the petition for writ of certiorari filed by petitioner, Joseph G. Budinich, seeking review of the opinion of the Tenth Circuit Court of Appeals in this case.

STATEMENT OF THE CASE

This matter arises out of an employment contract under which the petitioner served as respondent's Western Regional Manager for a salary plus a commission on sales. Prior to the completion of a major sale of vapor sensing equipment to the United States Air Force, respondent modified its commission structure applicable to employees on petitioner's level. Although petitioner initially protested the consequent reduction in the commission expected on that sale, he continued employment with the respondent for more than two years after the commission change. Petitioner was terminated from his position in November of 1981.

In February, 1982, Petitioner filed this action in the Denver District Court, City and County of Denver, State of Colorado. The matter was removed to the United States District Court for the District of Colorado on the basis of the diversity of citizenship of the parties.

Petitioner's original action asserted claims for breach of contract (wrongful termination), quantum meruit, misrepresentation and outrageous conduct. Prior to the trial on these issues, the District Court granted summary judgment in favor of the respondent on the claims for breach of contract and outrageous conduct. After trial to a jury, verdict was entered for the respondent on the misrepresentation and implied contract claims. The petitioner prevailed solely on his claim for additional commissions on a post-termination supplemental purchase order and was awarded $5,000. No claim for attorneys fees was raised, either in the complaint or any of the pleadings. No evidence was presented on attorneys fees during the course of these proceedings.

Judgment entered on March 26, 1984. On March 30, 1984, petitioner filed a bill of costs raising a claim for attorneys fees for the first time. On April 2, 1984 petitioner filed a Motion for Attorney's Fees simultaneously with a Motion for New Trial, Amendment of Judgment and Relief from Judgment or Order. On May 14, 1984, the District Court denied the substantive motions but granted petitioner's Motion for Attorney's Fees. In that Order, the Court determined that under the Colorado Revised Statutes, § 8-4-114, a winning party was entitled to attorneys fees to be taxed as part of the costs of the action. ("Any attorney's fees awarded must be included in the costs taxed in this action.") (Appendix, page 35a). Subsequently, on July 3, 1984 the court entered an order awarding attorneys fees to the petitioner in the amount of $1,000.

Petitioner then filed a Motion for Relief from Judgment relating to attorneys fees. That motion was denied on August 1, 1984. Petitioner filed his only notice of appeal on August 29,

1984. The Tenth Circuit Court of Appeals, relying upon its decision in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982), found the appeal to be untimely and granted respondent's motion for summary dismissal. An order of dismissal was entered as to all issues except the amount of attorneys fees, which was affirmed. The petitioners Petition for Rehearing was denied on March 26, 1984. This Petition for Certiorari followed.

REASONS WHY THE WRIT SHOULD BE DENIED

In seeking certiorari, petitioner, Joseph G. Budinich claims that the decision of the U.S. Court of Appeals for the Tenth Circuit in this case, founded upon its ruling in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982), is in conflict with decisions of this court and in conflict with decisions of other circuit courts of appeals. Respondent, Becton Dickinson and Company, respectfully submits that the approach adopted by the Tenth Circuit and the majority of circuit courts is in accord with the decisions of this court regarding the finality of judgments and time limits for appeal. Moreover, under the facts of this case, application of the guidelines adopted by those federal courts of appeal cited by petitioner in support of his position would yield a result identical with that of the Tenth Circuit; to wit, that the petitioner's failure to file an appeal of the judgment entered in this matter within thirty days of the entry of that judgment barred his appeal, regardless of the fact that a motion to tax attorneys fees as costs was still pending. Petitioner has cited no authority to invoke the jurisdiction of this court under United States Supreme Court Rules 17.1. For that reason, and the reasons set forth more fully below, Mr. Budinich's position does not justify review on certiorari.

I. CERTIORARI IS INAPPROPRIATE WHERE THE STANDING DECISIONS OF THIS COURT SUPPORT THE APPELLATE COURT'S DETERMINATION THAT TIME LIMITS FOR FILING AN APPEAL ARE GOVERNED BY FEDERAL LAW AND PROCEDURE.

The petitioner herein seeks to distinguish this case from the rule adopted by the majority of circuit courts that a decision on the merits is final and appealable regardless of the pendency of a motion for attorneys fees. In attempting to preserve his appeal of the adverse judgment in this matter, petitioner first alleges error in the Tenth Circuit's application of its decision in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982) to a diversity action. Applying *Cox*, the Tenth Circuit determined that petitioner's appeal of the judgment on the merits was untimely, having been filed outside of the thirty day time limit set forth in Federal Rule of Appellate Procedure, Rule 4, which states:

> In a civil case in which an appeal is permitted by law as a right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within thirty days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within sixty days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals will note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

The petitioner seeks to characterize the specification of time for filing an appeal from a final judgment in a diversity action as a substantive matter, governed by state law under the rule of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). Petitioner's argument is without merit.

It is long settled that matters of federal court procedure are controlled by federal law. *Hanna v. Plummer*, 85 S.Ct. 1136, 380 U.S. 460 (1965), 14 L.Ed.2d 8, (1965); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 78 S.Ct. 893, 356 U.S. 525, 2 L.Ed. 2d 953 (1958); *Hardin v. Manitowoc-Forsythe Corporation*, 691 F.2d 449 (10th Cir. 1982). As *Cox v. Flood, supra*, illustrates, even in those decisions where the appellate courts have determined that, in diversity actions, the underlying relationship of attorneys fees to the merits is a matter of state law, federal law has been applied to the ultimate issue of appellate jurisdiction. See *Certain British Underwriters v. Jet Charter Service, Inc.*, 739 F.2d 534, 535-36 (11th Cir. 1984) (rules of state procedures are not binding in a federal diversity case) and *Oxford Production Credit Association v. Duckworth*, 689 F.2d 587, 588-89 (5th Cir. 1982). Petitioner has cited no authority for his argument that state law should govern the purely procedural question of the time strictures for the filing of an appeal, and this court should deny certiorari on that ground.

II. CERTIORARI IS INAPPROPRIATE WHERE THE APPELLATE COURT'S DETERMINATION OF THE TIMELINESS OF THIS APPEAL IS SUPPORTED BY THE DECISIONS OF THIS COURT AND IS NOT IN CONFLICT WITH THE DECISION OF OTHER FEDERAL COURTS OF APPEAL.

Petitioner argues that, if the timeliness of an appeal is indeed a matter of federal law, then the approach adopted by the majority of the circuit courts of appeal, including the Tenth Circuit, is erroneous. That approach is derived from the decision in *White v. New Hampshire*, 102 S. Ct. 1162 (1982), 455 U.S. 445, 71 L.Ed. 2d 325. Under the majority rule, derived from *White*, a judgment finally disposing of the merits of a case is appealable, and triggers the time for appealing,

regardless of the pendency of a claim for attorneys fees and regardless of whether the claim for fees is characterized as integral or collateral to the merits of the case. That uniform, unqualified rule is the only fair approach to utilize when applying a procedural rule that may in fact require forfeiture of the underlying claim. See *Cox v. Flood, supra; West v. Keve,* 721 F.2d 91 (3rd Cir. 1983); *Smillis v. Park Chemical,* 710 F.2d 271 (6th Cir. 1983); *Exchange National Bank of Chicago v. Daniel,* 763 F.2d 286 (7th Cir. 1985); *International Association of Bridge Structural, Ornamental and Reinforcing Iron Workers Local v. Madison Industries, Inc.,* 733 F.2d 656 (9th Cir. 1984).

Petitioner claims that attorneys fees are an inherent part of the relief sought and therefore must be determined before any judgment on the merits could be final and appealable. Petitioner cites as authority the decisions in a minority of circuit courts which have adopted a situational approach to a determination of the finality of judgments. Petitioner cannot demonstrate, however, that the application of the situational approach utilized by those courts would make for a different result than the one rendered by the Tenth Circuit.

The situational approach requires a de facto, case by case analysis of the nature of the attorneys fees involved in the underlying action. The minority view divides cases involving attorneys fees into two categories. In the first category, attorneys fees are similar to costs and therefore collateral to the action. In those cases, a lack of determination as to the amount of attorneys fees does not preclude the issuance of a final appealable judgment on the merits. The second category includes those cases where the attorneys fees are an integral part of the merits of the case and the scope of relief and cannot be characterized as costs. Only in the latter situation is the determination of attorneys fees a necessary part of a final, appealable judgment. *Holmes v. J. Ray McDermott and*

Company, 682 F.2d 1143 (5th Cir. 1982), *cert. denied* 459 U.S. 1107 (1983); *McQurter v. Atlanta,* 724 F.2d 881 (11th Cir. 1984) *Alcorn County v. U.S. Interstate Supplies, Inc.,* 731 F.2d 1160 (5th Cir., 1984).

Applying the criteria utilized by the courts under the situational approach, the attorneys fees in this action are collateral to the judgment, and do not toll the time for filing an appeal. Petitioner claims attorneys fees in this action under the Colorado wage claim statute which provides,

> Whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages and penalties due as provided by §§ 8-4-104 and 8-4-105, the judgment in such action shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action. (C.R.S. § 8-4-114 (1986 Cumulative Supplement)).

The issue of attorneys fees was first raised in the Bill of Costs filed by the petitioner subsequent to the judgment. Attorneys fees had never been raised in the pleadings, at or before the trial, and were never denominated as an element of damages. The Motion for and Memorandum in Support of Attorneys Fees characterized the petitioner's request for attorneys fees as costs. The extensive analysis of the Fifth Circuit in *Holmes, supra,* makes it clear that even in the minority view, statutory attorneys fees which are similar to costs, which are not an element of damages and which are collateral to the action do not toll the running of the time frame applicable to an appeal of a judgment on the merits. *Holmes, supra,* 682 F.2d 1143 at 1146. See also *Knighton v. Watkins,* 616 F.2d 795 (1980); *Alcorn County v. U.S. Interstate Supplies Inc., supra,* 731 F.2d at 1164. ("If the county had failed to request attorneys fees in its complaint, that would suggest that they were not integral to

the merits of this case".) *F. H. Krear and Company v. Nineteen Named Trustees,* 776 F.2d 1563 (2nd Cir. 1985) (Contractually stipulated attorneys fees are distinguishable from awards of attorneys fees pursuant to statute.)

The attorneys fees claimed under the wage claim statute are labeled as costs, taxed as costs, first requested in a bill of costs, and were never characterized as part of the judgment on the merits. Under such circumstances, the decision of the Tenth Circuit does not conflict with the situational approach. Even under the method advocated by petitioner, the attorneys fees entitlement herein would clearly fall within the category of costs and have been considered collateral to a judgment on the merits. The petitioner has thus failed to demonstrate grounds upon which certiorari should be granted.

III. COLORADO DOES NOT MANDATE A JOINT APPEAL OF THE MERITS AND OF ATTORNEY'S FEES.

The Colorado cases cited by petitioner do not support the proposition that the attorneys fees under consideration herein are part of the judgment under Colorado law. None of the cases cited by petitioner involve consideration of the Colorado wage claim statute or any other statute where attorneys fees are specifically addressed and directed to be taxed as costs. *Marietta v. Busto,* 691 P.2d 345, (Colo. App. 1984), *cert. denied,* 105 S.Ct. 2024 (1985), is a trade secrets case where, the trial court specifically reserved the issue of recoverability of attorneys fees for a later determination. Under those circumstances, the trial court retained jurisdiction to consider post-trial motions and no final judgment entered. *Ortega v. Board of County Commissioners,* 657 P.2d 989 (Colo. App. 1982) did not address the collateral nature of attorneys fees. In a one-paragraph opinion, the state appellate court found only that the appeal had not been perfected when the only issue raised by the cross-appellant was attorneys fees and no order regarding attorneys

fees had yet been entered by the trial court. In *Ball Corporation v. Loran,* 596 P.2d 412 (Colo. App. 1979), the appellate court rejected an attempt to certify the question of liability in a bifurcated proceeding where damages had not yet been determined, finding the requisites of Colorado Rule of Civil Procedure 54(b) had not been met. Attorneys fees are not addressed.

CONCLUSION

The Petition for Certiorari should be denied. Petitioner has failed to demonstrate that the Tenth Circuit Court of Appeals has rendered a decision in the instant case that would be in conflict with a decision of any federal court of appeals under the circumstances and facts of this case. Any question of the collateral nature of attorneys fees to be taxed as costs in an action has been previously determined by this court in its decision in *White v. New Hampshire, supra,* 455 U.S. 445 (1982). Considering that no grounds exist under Supreme Court Rule 17.1 to grant certiorari, the respondent herein prays that the Petition for Certiorari be denied.

Respectfully submitted,

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III

APPENDIX

I. ORDERS SOUGHT TO BE REVIEWED

A. Per curiam opinion entered December 12, 1986 in the United States Court of Appeals for the Tenth Circuit ..... Page 2a

B. Denial of Motion For Reconsideration reviewed as a motion for recall entered March 26, 1987 in the United States Court of Appeals for the Tenth Circuit ..... Page 11a

II. ORDERS RELATING TO THE OPINION SOUGHT TO BE REVIEWED

A. Order of May 31, 1983 granting in part and denying in part Defendant's Motion For Summary Judgment and Order denying Plaintiff's Motion For Partial Summary Judgment entered in the United States District Court for the District of Colorado ..... Page 13a

B. Judgment of March 26, 1984 entered in the United States District Court for the District of Colorado ..... Page 21a

C. Order of May 14, 1984 entered in the United States District Court for the District of Colorado ..... Page 23a

D. Order of July 3, 1984 entered in the United States District Court for the District of Colorado ..... Page 38a

E. Order of August 1, 1984 entered in the United States District Court for the District of Colorado ..... Page 45a

III. ADDITIONAL APPENDED MATERIALS

A. Petition for rehearing filed in the United States Court of Appeals for the Tenth Circuit ..... Page 48a

APPENDIX I.A

PER CURIAM OPINION ENTERED DECEMBER 12, 1986
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOSEPH G. BUDINICH,

Plaintiff-Appellant,

v.

BECTON DICKINSON AND COMPANY,
a foreign corporation,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 82-F-462)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

William S. Finger of Nicholls, Kusic, Frank & Finger, Evergreen, Colorado, for Plaintiff-Appellant.

Terre Lee Rushton of Kelly, Haglund, Garnsey & Kahn, Denver, Colorado, for Defendant-Appellee.

Before McKAY, SETH, and TACHA, Circuit Judges.

PER CURIAM.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a). this appeal came on for consideration on the briefs and record on appeal.

This action arises out of an employment contract under which plaintiff served as defendant's western regional manager for a salary plus commission on sales. Prior to plaintiff's completion of a major sale to the United States Air Force, defendant's commission structure was modified, resulting in a substantial reduction in the commission ultimately paid to plaintiff. Although he protested, plaintiff continued his employment with defendant. Sometime later, and shortly before an order for spare parts and a supplemental purchase order were placed by the Air Force, defendant terminated plaintiff's employment.

Plaintiff initially brought this diversity action asserting claims for breach of contract, quantum meruit, misrepresentation, and outrageous conduct. Following a lengthy procedural course, during which plaintiff's claims were revised somewhat as a result of the district court's grant of partial summary judgment for defendant, the case was tried to a jury, which found for defendant on plaintiff's misrepresentation and implied contract (for commission on the spare parts order) claims but awarded plaintiff $5,000 on an implied contract theory regarding the supplemental purchase order.

The district court entered judgment on the verdict on March 26, 1984. Plaintiff timely filed an original and an amended new trial motion challenging various substantive rulings by the district court, as well as a motion for attorney's fees. On May 16, 1984, the new trial motions were disposed of, but the district court reserved determination of the amount of attorney's fees to be awarded to plaintiff. The district court ultimately issued its final order regarding the fees issue on August 2, 1984, and plaintiff filed his sole notice of appeal from the court's post-trial orders on August 29, 1984.

Defendant has moved for summary dismissal of this appeal as untimely, relying on the principle we first announced in Cox v. Flood, 683 F.2d 330 (10th Cir. 1982). In Cox and several later cases, this court held that judgments finally disposing of the merits are appealable even though questions relating to attorney's fees have been left undecided. *Id.* at 331; *see, e.g.*, Art Janpol Volkswagen v. Fiat Motors, 767 F.2d 690 (10th Cir. 1985); *cf.* Dataq, Inc. v. Tokheim Corp., 736 F.2d 601 (10th Cir. 1984). Accordingly, an appeal on the merits must be filed within the requisite time period following entry of final judgment thereon, notwithstanding that a motion for attorney's fees may be pending. *See* West v. Keve, 721 F.2d 91 (3d Cir. 1983); Smillie v. Park Chemical Co., 710 F.2d 271 (6th Cir. 1983). Since plaintiff did not file a notice of appeal from the district court's May 16, 1984, order disposing of his new trial motions until August 29, 1984, when he appealed the district court's award of $1,000 in attorney's fees, defendant contends that the former appeal must be dismissed as untimely.

Plaintiff seeks to avoid the effect of the authorities cited by arguing that, unlike our previous decisions, the present case involves a situation where attorney's fees are an inherent part of the relief sought and, consequently, must be determined before the judgment on the merits can be considered final. While there is some authority for the type of suitational approach advocated by plaintiff, *see* F. H. Krear & Co. v. Nineteen Named Trustees, 776 F.2d 1563 (2d Cir. 1985); McQurter v. Atlanta, 724 F.2d 881 (11th Cir. 1984); Holmes v. J. Ray McDermott & Co., 682 F.2d 1143 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983), we believe the better course is followed in those circuits which treat all attorney's fees motions as procedural equivalents and uniformly require separate notices of appeal when such motions are resolved after judgment has been rendered on the merits. *See* Exchange National Bank v. Daniels, 763 F.2d 286 (7th Cir. 1985); Morgan v. Union Metal

Manufacturing, 757 F.2d 792 (6th Cir. 1985); International Association of Bridge, etc., Local Union 75 v. Madison Industries, Inc., 733 F.2d 656 (9th Cir. 1984); West v. Keve, *supra*.

A uniform, unqualified rule is especially appropriate in the present context for several reasons. First, the de facto, case-by-case analysis required by the situational approach, and the consequent uncertainty it would promote until an inclusive and coherent set of principles could be worked out, is particulary unsuited to a jurisdictional rule that requires forfeiture of an appeal for noncompliance. *See Daniels, supra* at 293; 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3915 at 398-401 (Supp. 1985); *see also* Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165 n.4 (5th Cir. 1984) (Fifth Circuit acknowledging the difficulties its situational approach may cause litigants). Second, to be consistent, those courts holding that under particular circumstances fees are an integral part of the judgment, which is therefore not final until the matter of fees is resolved, must also hold that motions relating to such fees are, in effect, motions to alter or amend judgment and thus subject to the time constraints of Fed. R. Civ. P. 59(e). This result, however, cannot be endorsed in light of the Supreme Court's analysis and decision in White v. New Hampshire, 455 U.S. 445 (1982) (holding Rule 59(e) inapplicable to requests for fees under 42 U.S.C. § 1988). Of course, the *White* holding specifically applies only to §1988 requests, but nothing in the opinion indicates that motions seeking fees pursuant to other authority should be treated any differently. *See id.* at 450-55. Third, divining the degree of relationship between attorney's fees and the compensation sought in any particular case is a procedure of uncertain design and questionable validity. The Third Circuit has expressed this concern in more specific terms:

> We reject as altogether too metaphysical the distinction between fees that are "compensation for injury" and those that are not. All awards of fees make the prevailing party better off. Whether this benefit is "really" a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation, thus making redress of the underlying hurt more likely and leaving the prevailing party with a greater net award, is a question of semantics rather than substance. Resolution of this question would depend on the legislative (or bargaining) history of a given statute or contract — if indeed such a question ever has a sensible answer.

Daniels, supra at 294. Finally, we note that the adoption of a per se rather than situational approach is certainly consistent with, if not compelled by, this court's unqualified holdings in prior decisions. *See, e.g., Cox supra* at 331 ("judgments finally disposing of the merits are appealable even though questions relating to attorney's fees have been left undecided"); Clulow v. Oklahoma, 700 F.2d 1291, 1293 n.1 (10th Cir. 1983) ("outstanding motions for fee awards are no longer to be considered as affecting the finality and appealability of decisions on the merits").

Plaintiff also argues that, since this is a diversity action, the rule of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), precludes the application of the principles developed by this court in *Cox* and subsequent cases. In plaintiff's view, the law of Colorado, the forum state, which apparently would permit joint appeal of the merits and attorney's fees determinations under the present circumstances, *see* Marietta v. Busto, 691 P.2d 345, 347 (Colo. App. 1984), *cert. denied,* 105 S. Ct. 2024 (1985), must be applied. We disagree. State law governs only

those issues that are properly characterized as substantive; matters of procedure are controlled by federal law. Hanna v. Plumer, 380 U.S. 460 (1965); Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982). The specification of the time for filing a notice of appeal from the judgment of a federal district court is clearly a question of federal procedure and as such is governed by federal law. *See generally Art Janpol Volkswagen, supra,* and *Daniels, supra* (both cases applying federal law to the issue presently under consideration, without acknowledgment of any *Erie* problem). Diversity cases decided by courts following the situational approach, such as Certain British Underwriters v. Jet Charter Service, Inc., 739 F.2d 534, 535-36 (11th Cir. 1984) and Oxford Production Credit Association v. Duckworth, 689 F.2d 587, 588-89 (5th Cir. 1982), which hold the *underlying* determination of the relationship of fees to the merits to be a matter of state law, are not necessarily inconsistent with the result reached here. Indeed, these decisions do apply federal law — *i.e.*, the situational approach developed by the particular circuit — to the ultimate issue of appellate jurisdiction.

For the reasons discussed above, we hold that the principle first enunciated in *Cox* applies in diversity as well as federal question cases regardless of the perceived relationship between the fee award and the determination of the underlying controversy. Furthermore, we find plaintiff's plea for nonretroactive application of our decision to be entirely out of place. While this court has not yet expressly ruled on the issues raised by plaintiff's proposed exception to *Cox*, not one of our post-*Cox* decisions even suggests that the situational approach advocated by plaintiff might be adopted or that diversity cases would somehow warrant special treatment. We are neither overruling clear past precedent nor deciding an issue of first impression whose resolution was not clearly foreshadowed. *See* EEOC v. Gaddis, 733 F.2d 1373, 1376 (10th Cir. 1984). If

nonretroactivity were required under these circumstances, virtually every appellant with enough intellectual ingenuity to state his position in terms of an as yet unconsidered exception to an existing rule would be able to side-step the "new principle of law" hurdle imposed in *Gaddis*.

Accordingly, plaintiff's attempted appeal from the district court's judgment on the merits must be dismissed. The notice of appeal, filed more than thirty days after the denial of plaintiff's motions for new trial, was untimely and ineffective. Fed. R. App. P. 4(a)(1) and (4).

Defendant has also moved to dismiss this appeal as it relates to the district court's order of August 2, 1984, which finally resolved the issue of attorney's fees. Defendant contends that plaintiff's notice of appeal, filed after said order but before the fees were taxed as costs in accordance with the court's direction, was premature. This argument is without merit. The taxation of costs is a ministerial function, and, as such, its completion is not a prerequisite to the finality of the district court's underlying order regarding fees. *See* United States v. 2, 186.63 Acres of Land, 464 F.2d 676, 678 (10th Cir. 1972).

Without a single reference to any supporting authority, plaintiff asserts that the district court's award of fees is contrary to existing standards and inadequately vague. We cannot agree. Indeed, in light of the thorough analysis evident in the district court's orders addressing the matter, and the unsupported, perfunctory objections raised by plaintiff on appeal, very little need be said about the fee award. The determination of a reasonable fee under Colo. Rev. Stat. § 8-4-114 is a question of fact for the trial court and should not be disturbed on review unless patently erroneous and unsupported by the evidence. Hartman v. Freedman, 591 P.2d 1318, 1322 (Colo. 1979). Plaintiff has failed to demonstrate such error here.

The motion for summary disposition is GRANTED and the appeal DISMISSED as to all issues except the award of

attorney's fees. The judgment of the United States District Court for the District of Colorado awarding attorney's fees to plaintiff in the amount of $1,000 is AFFIRMED. Plaintiff's request for additional briefing is inappropriate and, in light of the disposition of this appeal, moot. The mandate shall issue forthwith.

APPENDIX I.B

DENIAL OF MOTION FOR RECONSIDERATION REVIEWED AS A MOTION FOR RECALL ENTERED MARCH 26, 1987 IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JANUARY TERM — March 26, 1987

Before Honorable Monroe G. McKay, Honorable Oliver Seth, and Honorable Deanell Reece Tacha, Circuit Judges, United States Court of Appeals

JOSEPH G. BUDINICH,

Plaintiff-Appellant,

v.

No. 84-2192

BECTON DICKINSON AND COMPANY,
a foreign corporation,

Defendant-Appellee.

This matter comes on for consideration of plaintiff's petition for rehearing, which we construe as a motion to recall the mandate.

Upon consideration thereof, the motion is denied.

/s/ ROBERT L. HOECKER
ROBERT L. HOECKER, Clerk

APPENDIX II.A

ORDER OF MAY 31, 1983 GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON AND COMPANY,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Chief Judge Sherman G. Finesilver:

THIS MATTER is before the Court on Plaintiff's Motion for Partial Summary Judgment and on Defendant's Motion for Summary Judgment. Plaintiff seeks summary judgment only as to his First Claim for Relief while Defendant seeks summary judgment on all claims in Plaintiff's Complaint. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1332, diversity of citizenship.

The parties have been given the opportunity to thoroughly brief all issues presented by the two motions. Upon careful consideration of those briefs, the evidence presented, and the applicable law, we are of the view that Plaintiff's Motion for Partial Summary Judgment should be DENIED and that Defendant's Motion for Summary Judgment should be GRANTED IN PART and DENIED IN PART. Because of

the imminence of the trial in this case, and therefore the necessity for a speedy resolution of these motions, the Court will not set forth a detailed review of either the facts or the law which support this Order. The Court reserves the right to do so at a later date.

The disputes in this case arise out of the parties' employment relationship. Plaintiff was employed by Defendant in either late 1978 or early 1979 as the Western Regional Sales Manager for Defendant. He was employed in that capacity until his termination on November 30, 1981. Part of Plaintiff's compensation as a regional sales manager was a commission on sales of Defendant's products within his region. Prior to October 1979, Defendant utilized a commission schedule which paid 2% on total net sales from base to quota and 4% on total net sales exceeding annual quota. Defendant modified its commission schedule at its quarterly national sales meeting in October, 1979. The revised commission schedule provided for a $10,000 ceiling on a commission earned on any one sale.

The immediate controversy arose with the completion of a large contract with the United States Air Force for the purchase of 157 portable vapor dectors ("PVD's") manufactured by Defendant. With the signing of the definitive award/contract on August 6, 1981, Plaintiff was paid a commission on the sale of $10,000. On November 3, 1981, Plaintiff wrote a letter to Defendant demanding payment of a commission pursuant to the original commission schedule in effect prior to October, 1979. Plaintiff was terminated on November 30, 1981. Subsequent to his termination, Defendant entered into a separate contract with the Air Force for the purchase of an additional 77 PVD's and modified the original contract to include spare parts and accessories. Plaintiff brought this suit for breach of his employment contract, *quantum meruit*, false representation, wrongful discharge, and outrageous conduct.

Plaintiff seeks additional compensation on the August 6, 1981 contract pursuant to the original commission schedule and the payment of a commission on both the subsequent contract with the Air Force and the modification of the first contract.

Summary judgment is appropriate only where the pleadings, affidavits, depositions, admissions, or other evidence submitted demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See eg. Cayce* v. *Carter Oil Company*, 618 F.2d 669 (10th Cir. 1980); *Webbe* v. *McGhie Land Title Company*, 549 F.2d 1358 (10th Cir. 1977); Rule 56, Federal Rules of Civil Procedure. Where different inferences can be drawn from the same evidence, or where questions of credibility are present, summary judgment is not appropriate. *Norton* v. *Liddel*, 620 F.2d 1375 (10th Cir. 1980); *Eagle* v. *Louisiana Southern Life Insurance Company*, 464 F.2d 607 (10th Cir. 1972).

In his First Claim for Relief, Plaintiff alleges that Defendant willfully and intentionally breached the provisions of the employment contract with Plaintiff by unilaterally modifying the commission schedule. Both parties have moved for summary judgment on this claim. The law in Colorado[1] is that in the absence of "special consideration or an express stipulation as to the duration of employment, an indefinite general hiring is terminable at will by either party." *Lampe* v. *Presbyterian Medical Center*, 590 P.2d 513, 514 (Colo. App. 1978). The parties are in agreement that the terms and conditions of Plaintiff's employment are set out in several letters exchanged by Plaintiff and Defendant in October, 1978. There is nothing in either letter that could reasonably be interpreted to construe Plaintiff's employment as being other than one terminable at will.

1. Because Plaintiff's employment with Defendant was centered in the State of Colorado, and because Colorado has an overriding interest in protecting its citizens in their employment, we find that the law of Colorado rather than that of either New York or New Jersey applies in this case.

An employment contract that is terminable at will is also modifiable at will; a modification having the effect of terminating the existing contract and substituting in its place a new contract with the modified terms. *Gebhard* v. *Royce Aluminum Corporation*, 296 F.2d 17 (1st Cir. 1961); *Bartinikas* v. *Clarklift of Chicago North, Inc.*, 508 F. Supp. 959 (N.D. Ill. 1981). Thus, Defendant's modification of its commission schedule in October, 1979, was not a breach of Plaintiff's employment contract. Additionally, it is undisputed that Plaintiff continued to work for Defendant as its Western Regional Sales Manager more than twenty-five months *after* the commission schedule was modified. During that period he accepted his full salary and commission based on the modified schedule. While Plaintiff voiced his disapproval of the modified schedule prior to its adoption, there is no evidence whatsoever to indicate that he ever objected to the schedule once adopted or refused to accept commissions earned under the new schedule. Such conduct constitutes acceptance of the modified contract as a matter of law. *See Gebhard* v. *Royce Aluminum Corporation*, *supra.*, at 19. Thus, Plaintiff's Motion for Partial Summary Judgment is DENIED and Defendant's Motion for Summary Judgment, as to Plaintiff's First Claim for Relief, is GRANTED.

Having found the existence of an express employment contract during the entire term of Plaintiff's employment with Defendant, summary judgment must also be granted with respect to Plaintiff's Second Claim for Relief, but only to the extent that Plaintiff claims additional commission from the August 6, 1981 contract. While breach of contract and *quantum meruit* may be plead as alternative theories of recovery, once an express contract providing for a fixed commission is established, Plaintiff is not entitled to recover on a *quantum meruit*. *See eg. Jensen* v. *Neal*, 124 P. 471 (Colo. 1912); *Reitler* v. *Olson*, 187 P. 313 (Colo. 1919); *cf. Palmer* v. Gleason, 389 P.2d 90 (Colo. 1964).

The Court does not, however grant summary judgment on Plaintiff's Second Claim for Relief as it relates to any commission which may or may not be due Plaintiff on the two contracts completed subsequent to his termination. The Colorado courts have made it clear that there is a distinction between the time when a commission is *earned* and when it is *due and payable. Weick* v. *Rickenbaugh Cadillac Company,* 303 P.2d 685, 687 (Colo. 1956). In the instant case, it is not clear from any of the letters evidencing Plaintiff's employment when a commission is *earned.* The affidavits submitted, and the other evidence, demonstrate a genuine issue of material fact on this point. Arguably, if Plaintiff can establish that a commission is *earned* some time prior to the actual execution of the contract documents in the two subsequent sales to the Air Force, then he would be entitled to recover the reasonable value of his services on those two sales. Thus, summary judgment is inappropriate on this issue.

In his Third Claim for Relief, Plaintiff asserts fraudulent misrepresentation and/or concealment regarding Defendant's commission schedules and the ability of defendant to modify said schedules without his consent. We find that Plaintiff has demonstrated sufficient material issues of fact in dispute with respect to Defendant's representations and intent to withstand Summary Judgment on these claims. Defendant's Motion for Summary Judgment on Plaintiff's Third Claim for Relief is DENIED.

Finally, Plaintiff alleges that he was terminated in order to deprive him of further commissions on subsequent sales of PVD's to the Air Force. He asserts that such conduct constitutes a wrongful discharge in violation of Colorado law. He also alleges that such conduct is outrageous as that tort has developed in Colorado. Taking the facts, as we must, in the light most favorable to Plaintiff, we nonetheless conclude that summary judgment is appropriate on Plaintiff's Fourth Claim for Relief. We do not agree with Plaintiff that Colorado has

adopted or even evinced an intent to adopt a "public policy" exception to the terminable at will doctrine. Even if such were the case, Plaintiff can point to no specific legislatively recognized policy which would protect him in this case. *See Lampe* v. *Presbyterian Medical Center, supra.* [where the Court of Appeals refused to hold for the plaintiff in spite of the existence of a "broad general statement of policy contained in a statute."] The fact remains that Plaintiff's employment was terminable at will, without cause. Plaintiff has not stated a cause of action for wrongful termination.

While the question whether Defendant has engaged in extreme and outrageous conduct is often a question of fact for the jury, the Court must make the threshold determination of whether reasonable persons could differ on the question. *See Rawson* v. *Sears Roebuck & Company,* 530 F. Supp. 766, 780 (D. Colo. 1982); *Vigoda* v. *Denver Urban Renewal Authority,* 624 P.2d 895, 898 (Colo. App. 1980). Taking the facts in the light most favorable to Plaintiff, we conclude that Defendant's conduct did not approach that level of conduct properly characterized as "outrageous." *Compare with Rugg* v. *McCarty,* 476 P.2d 753 (Colo. 1970); *Meiter* v. *Cavanaugh,* 580 P.2d 399 (Colo. App. 1978). Defendant is entitled to summary judgment on Plaintiff's Fourth Claim for Relief.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

IT IS HEREBY FURTHER ORDERED that Defendant's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. Plaintiff's First and Fourth Claims for Relief are dismissed *in toto.* Plaintiff's Second Claim for Relief

is dismissed only as it relates to a claim for additional commission on the August 6, 1981 sale. In all other respects, the Motion is denied.

DATED at Denver, Colorado this 31st day of May, 1983.

BY THE COURT:

/s/ SHERMAN G. FINESILVER

SHERMAN G. FINESILVER,
Chief Judge
United States District Court

APPENDIX II.B

JUDGMENT OF MARCH 26, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462
JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON AND COMPANY,

Defendant.

JUDGMENT

THIS CAUSE having come on regularly for trial before the Court, The Honorable Sherman G. Finesilver, District Judge presiding, and a jury having been duly impanelled and sworn to try the issues herein and the trial having proceeded to conclusion and having been duly submitted to the jury and the jury having subsequently rendered its verdict. It is

ORDERED that judgment is entered in favor of the plaintiff and against the defendant on plaintiff's claim for implied contract as to the contract for the sale of 79 additional PVD units, in the amount of $5,000.00, together with interest at the rate of 10.60% from the date of entry of this judgment. It is

FURTHER ORDERED that judgment is entered in favor of the defendant and against the plaintiff on plaintiff's claims of fraudulent concealment, misrepresentation and claim for implied contract as to the contract for the sale of spare parts and accessories and those claims are hereby dismissed.

DATED at Denver, Colorado this 26th day of March, 1984.

FOR THE COURT:

/s/ JAMES R. MANSPEAKER

JAMES R. MANSPEAKER,
Clerk
United States District Court

APPENDIX II.C

ORDER OF MAY 14, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON AND COMPANY,

Defendant.

— ORDER —

Sherman G. Finesilver, Chief Judge

IN THIS ACTION, Plaintiff originally sought recovery of compensatory and punitive damages, as well as costs and interest, on the following theories of recovery: breach of contract, quantum meruit, misrepresentation and/or fraudulent concealment, and wrongful termination. On May 31, 1983, the Court granted in part and denied in part Defendant's motion for summary judgment. The Court dismissed Plaintiff's claims for breach of contract and wrongful termination, and dismissed, in part, Plaintiff's claim for quantum meruit, to the extent that said claim sought additional commissions on a sale which took place on August 6, 1983. A trial on this matter was held commencing June 6, 1983. Said trial resulted in mistrial. The matter proceeded to a retrial on March 19, 1984. A jury verdict was returned on March 23, 1984, in favor of the Defendant on Plaintiff's claims of fraudulent concealment and/or misrepresentation, and quantum meruit as to the sale of spare parts and accessories. The jury found in favor of the Plaintiff on his

claim for quantum meruit as to the sale of 79 additional PVD units, and awarded the Plaintiff damages in the amount of $5,000.00.

This matter is before the Court on the following motions: (1) Motion For New Trial, Amendment Of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 2, 1984; (2) Amended Motion For a New Trial, Amendment Of Judgment, Relief From Judgement Or Order, filed by Plaintiff on April 6, 1984; (3) Motion For Attorney's Fees, filed by Plaintiff on April 2, 1984; (4) Motion To Review Taxation Of Costs, filed by Plaintiff on April 13, 1984; and (5) Motion To Review Taxation Of Costs, filed by Defendant on April 16, 1984.

The Court has thoroughly reviewed the briefs, statements and affidavits submitted by the parties in support of their respective positions on said motions. Upon a careful consideration of these matters, the Court finds as follows: (1) The Motion For New Trial, Amendment Of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 2, 1984, should be DENIED: (2) The Amended Motion For A New Trial, Amendment Of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 6, 1984, should be DENIED IN PART AND GRANTED IN PART; (3) The Motion For Attorney's Fees, filed by Plaintiff on April 2, 1984, will be GRANTED to the extent that the Court finds that Plaintiff is entitled to an award of reasonable attorney's fees; and (4) The Motion To Review Taxation Of Costs, filed by Plaintiff on April 13, 1984, and the Motion To Review Taxation Of Costs filed by Defendant on April 16, 1984, will be HELD IN ABEYANCE pending a determination of the amount of attorney's fees to be awarded in this case.

Plaintiff's Motion For New Trial, Amendment Of Judgment, And Relief From Judgment Or Order lists numerous

grounds upon which Plaintiff maintains that he is entitled to a new trial or an altered or amended judgment. Each of these grounds were considered and rejected by the Court prior to the trial or during the course of the trial on this matter. Plaintiff's motion does not provide the Court with any additional information or basis upon which we should alter our earlier rulings. Although the Court has again thoroughly reviewed the grounds asserted by the Plaintiff, the Court again finds that such grounds are individually and collectively without merit. Accordingly, the Court finds that Plaintiff's motion should be *DENIED.*

Plaintiff's Amended Motion For New Trial, Amendment Of Judgment, And Relief From Judgment Or Order ("Plaintiff's Amended Motion") raises, for the first time, a claim for prejudgment interest on the $5,000.00 Judgment entered in his proceeding. Plaintiff asserts that he is entitled to prejudgment interest pursuant to C.R.S. § 5-12-102, from February, 1982, the time at which Defendant booked the order for 79 PVD units which formed the basis of the $5,000.00 Judgment in this case. Although Defendant maintains that Plaintiff is not entitled to prejudgment interest in this case, Defendant does not contest that the prejudgment interest, if awarded, should be calculated from February, 1982 until the date Judgment entered in this case.

C.R.S. § 5-12-102(1) provides a statutory basis for prejudgment interest when money or property has been wrongfully withheld:

> Except as provided in section 13-21-101, C.R.S., when there is no agreement as to the rate thereof, creditors *shall* receive interest as follows: (a) When money or property has been wrongfully withheld, interest *shall* be an amount which fully recognizes the gain or benefit realized by the person withholding such money or property from the date of wrongful withholding to the date of payment or to the date

> judgment is entered, whichever first occurs; or, at the election of the claimant, . . .
> (b) Interest shall be at the rate of eight percent per annum compounded annually for all moneys . . . after they are wrongfully withheld or after they become due to the date of payment or to the date judgment is entered, whichever first occurs. (Emphasis added).

The mandatory language of C.R.S. § 5-12-102(1) clearly indicates that prejudgment interest is recoverable under this statute as a matter of right where a Plaintiff falls within the requirements of the statute. *See e.g., Hayes* v. *North Table Mountain Corp.*, 608 P.2d 830 (Colo. Ct. App. 1980). Furthermore, C.R.S. § 5-12-102(3) provides that "Interest shall be allowed as provided in [C.R.S. § 5-12-102(1)] even if the amount is unliquidated at the time of wrongful withholding or at the time when due." *See also Jasken* v. *Sheehy Constr. Co.*, 642 P.2d 58 (Colo. Ct. App. 1982).

Defendant maintains, in part, that Plaintiff is not entitled to an award of prejudgment interest because Plaintiff's Amended Motion was not filed in a timely manner. Plaintiff responds that the Amended Motion was filed in a timely manner pursuant to Rule 6(e) of the Federal Rules of Civil Procedure. The Court is of the view that Plaintiff's request for prejudgment interest is untimely if considered as a motion pursuant to Rule 59(b) and 59(e) of the Federal Rules of Civil Procedure. The Court finds, however, that Plaintiff's request is timely and appropriate when considered as a motion for the correction of a clerical error under Rule 60(a) of the Federal Rules of Civil Procedure.

Rule 59 of the Federal Rules of Civil Procedure provides that a motion for a new trial and a motion for amendment of judgment must be served not later than 10 days after entry of judgment. In addition, Rule 6(b) of the Federal Rules of Civil

Procedure expressly states that this time period may not be enlarged by the Court. *See* 6A *Moore's Federal Practice* ¶59.09[1] (and the cases cited therein).

In the instant case, as noted above, Judgment entered on March 26, 1984. Plaintiff filed and served his Amended Motion on April 6, 1984, eleven days after entry of Judgment. Therefore, Plaintiff's motion was not filed in a timely manner as required by Rule 59 of the Federal Rules of Civil Procedure.

We are not persuaded by Plaintiff's argument that the ten day period was extended by three days pursuant to Rule 6(e) of the Federal Rules of Civil Procedure. Rule 6(e) provides for an extension of time for actions which must be taken within a prescribed period after the service of a notice or other paper when such service is effected by mail. Rule 6(e), F.R.Civ.P. The time for filing a motion pursuant to Rule 59 of the Federal Rules of Civil Procedure is not enlarged by Rule 6(e) because the ten day period in which they must be filed runs from entry of judgment rather than from receipt of notice. *See Flint v. Howard*, 464 F.2d 1084 (1st Cir. 1972); Wright & Miller, *Federal Practice and Procedure* § 1171; 2 *Moore's Federal Practice* ¶6.12. *See also Reynolds v. Hunt Oil Co.*, 643 F.2d 1042 (5th Cir. 1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenback*, 525 F.2d 1179 (8th Cir. 1975). We find particularly persuasive on this point the reasoning articulated by the First Circuit Court of Appeals in *Flint v. Howard, supra:*

> A second alleged ground for rehearing is a plea to add the three-day grace period described in Rule 6(e), Fed.R.Civ.P., to the time allowed for filing a Rule 52 or 59 motion. The problem with this argument is that Rules 52 and 59 both provide that the 10 days within which a motion for reconsideration must be filed begins to run from "entry of judgment" rather than from receipt of notice and Rule 6(b), Fed.R.Civ.P., prohibits enlargement of

> such time. Petitioner's ingenious and undocumented effort to justify an additional three-day mailing period does not persuade us.

Flint v. Howard, 464 F.2d at 1086. Accordingly we find that Plaintiff's Amended Motion should be *DENIED* to the extent that it seeks to assert a claim under Rule 59 of the Federal Rules of Civil Procedure.

Although the issue was not raised, as such, by the Plaintiff, the Court is of the view that Plaintiff's request for prejudgment interest should be considered as a timely request under Rule 60(a) of the Federal Rules of Civil Procedure.

Rule 60(a) provides, in pertinent part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Rule 60(a), Fed.R.Civ.P. Motions filed under Rule 60(a) are clearly not restricted by the ten day rule established by Rule 59 of the Federal Rules of Civil Procedure.

Where a prevailing party has an unconditional statutory right to prejudgment interest on an award, the failure to include the interest in the judgment is a "clerical mistake" that can be corrected under Rule 60(a). *See Hayden v. Scott Aviation, Inc.*, 684 F.2d 270 (3rd Cir. 1982); *Glick v. White Motor Co.*, 458 F.2d 1287, 1293-94 (3rd Cir. 1972); *Gilroy v. Erie-Lachawann R.R.*, 44 F.R.D. 3, 4 (S.D.N.Y.); *In re Merry Queen Transfer Corp.*, 266 F. Supp. 605, 607 (E.D.N.Y. 1967) *modified in other respects sub nom., O'Rourke v. Queen Transfer Corp.*, 370 F.2d 781 (2nd Cir. 1967); Wright & Miller, *Federal Practice and Procedure* § 2854. *Cf. Goodman v. Heublein*, 682 F.2d 44 (2nd Cir. 1982) (Court acknowledged that where state substantive law provided right to prejudgment interest, failure to provide such interest could be characterized as clerical error

under Rule 60(a); however, rule was inapplicable where award of prejudgment interest under ADEA was governed by federal, not state, law). *But see Chicago & N.W.Ry.Co. v. Union Packing Co.*, 527 F.2d 592 (8th Cir. 1976). On the other hand, if granting prejudgment interest is within the discretion of the court, the judgment must be amended pursuant to Rule 59 of the Federal Rules of Civil Procedure. *See Stern v. Shouldice*, 706 F.2d 742 (6th Cir. 1983), *cert. denied* 104 S.Ct. 487 (1984); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147 (1st Cir. 1980).

In the instant case, as noted above, the Court is of the view that prejudgment interest is available to the Plaintiff as a matter of right pursuant to C.R.S. § 5-12-102(1). Accordingly, the Court finds that Plaintiff's request for prejudgment interest can be considered a timely request pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

Defendant maintains that Plaintiff's request for prejudgment interest, even if timely, should be denied because Plaintiff did not raise or address this issue at or before the trial in this case. The Court finds this argument to be without merit. The Court initially notes than Plaintiff's Complaint contained a request for an award of interest. Furthermore, courts have consistently held that a plaintiff's failure to pursue his request for prejudgment interest during the trial, or even to demand such interest in his complaint, does not amount to a waiver of his right to interest. *See Mallis v. Bankers Trust Co.*, 717 F.2d 683 (2nd Cir. 1983) (and cases cited therein). Accordingly, the Court finds that Plaintiff has not waived his claim for prejudgment interest in the instant case.

Defendant's final objection to Plaintiff's claim for prejudgment interest is that C.R.S. § 8-4-101 does not authorize prejudgment interest in the instant case. The Court acknowledges that C.R.S. § 8-4-101 does not authorize an award of

prejudgment interest in this case; however, the basis for such an award, as noted above, is C.R.S. § 5-12-102. C.R.S. § 8-4-101, *et seq.*, is relevent to this discussion, if at all, as a means for determining the time from which the interest in question should be calculated. As noted above, in *Hayes v. North Table Mt. Corp., supra*, the Colorado Court of Appeals held that interest on a brokerage commission, awarded pursuant to C.R.S. §5-12-102, was due on the commission from the date that the commission was due and payable. C.R.S. § 8-4-104 lends additional support to this conclusion. The Colorado Court of Appeals, in interpreting C.R.S. § 8-4-104(2), has concluded that commissions not fully earned at the time of termination need not be paid under this provision at the time of termination; however, such wages become immediately due at the time they were fully earned. *See Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975). Accordingly, the Court finds that Plaintiff is entitled to an award of prejudgment interest on the $5,000.00 commission which formed the basis of the jury verdict in this case from the date that the commission was due and payable.

Plaintiff maintains that this right to prejudgment interest commenced in February, 1982, at the time the Defendant booked the 79 PVD order for $600,013.00. Defendant does not contest Plaintiff's assertion that prejudgment interest, if it is to be awarded in this case, should be calculated from February, 1982. Furthermore, the Court notes that the pretrial order in this case lists, as an "uncontroverted fact," that "a formal written contract was executed in January, 1982 regarding the $600,013.00 purchase of additional PVD units." Therefore, the Court finds that Plaintiff is entitled to an award of prejudgment interest on the $5,000.00 judgment in this case, said interest to be calculated from February, 1982 until judgment entered in this case, at a rate of eight percent per annum compounded annually.

In his motion for attorney's fees, Plaintiff maintains that he is entitled to an award of reasonable attorney's fees pursuant to C.R.S. § 8-4-114.

C.R.S. § 8-4-114 provides:

> Whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages and penalties due as provided by sections 8-4-104 and 8-4-105, the judgment in such action shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action.

The Colorado Court of Appeals has explained that recovery of attorney's fees under C.R.S. § 8-4-114 is a matter of right, and only the amount of such a recovery is within the discretion of the trial court:

> Section 114, in providing that the judgment "shall include a reasonable attorney fee in favor of the winning party," leaves nothing to the discretion of the trial court except to determine what is a "reasonable fee."

Keeton v. Rike, 559 P.2d 262, 263 (Colo. Ct. App. 1977). *See also Hofer v. Polly Little Realtors, supra.*

The Court is of the view that the $5,000.00 judgment in this case is based on a claim for wages within the meaning of C.R.S. § 8-4-104, 8-4-105. Commissions are clearly within the definition of "wages" for purposes of these provisions. *See* C.R.S. § 8-4-101(9); *Hofer v. Polly Little Realtors, Inc., supra.* Therefore, the Court finds that Plaintiff is entitled to an award of reasonable attorneys fees with respect to the recovery of said wages pursuant to C.R.S. § 8-4-114.

The Court rejects Defendant's argument that attorney's fees are not recoverable under C.R.S. § 8-4-114 for a claim based on quantum meruit. C.R.S. § 8-4-114, in defining "wages or compensation" for purposes of these provisions,

specifies that the terms include amounts owed ". . . whether the labor or service is performed under contract, subcontract, partnership, subpartnership, station plan, or other agreement for the performance of labor or service if the labor or service to be paid for is performed personally by the person demanding payment." Furthermore, C.R.S. § 8-4-104 provides, in pertinent part, that wages or compensation become due and payable ". . . when an employee not having a written contract for a definite period quits or resigns his employment." These provisions clearly suggest that C.R.S. § 8-4-104, 8-4-105 and 8-4-114 are not limited to cases involving wages or compensation due pursuant to a written contract. Therefore, the Court finds that attorneys fees are recoverable under C.R.S. § 8-4-114 regardless of whether a plaintiff's claim is based on breach of contract or quantum meruit.

The Court also rejects Defendant's argument that C.R.S. § 8-4-104 conditions recovery of attorney's fees upon a determination of the employer's lack of a good-faith legal justification for the refusal to pay wages in a timely fashion. The provision to which the Defendant apparently refers, C.R.S. § 8-4-104(3) provides for a penalty to be added to the compensation legally proven to be due, in an amount equal to fifty percent thereof, if an employer refuses to pay wages or compensation without a good-faith legal justification for such refusal. However, an award of attorney's fees under C.R.S. § 8-4-114 is not dependent on an imposition of a penalty under C.R.S. § 8-4-104. *See Keeton v. Rike, supra, Hofer v. Polly Little Realtors, Inc., supra.* Accordingly, the lack of a finding in this case regarding Defendant's good-faith legal justification in refusing to pay the wages in question does not affect Plaintiff's claim for attorney's fees under C.R.S. § 8-4-114.

Defendant's final objection to Plaintiff's motion for attorney's fees is that Plaintiff has failed to file adequate records in support of his request as required by Rule 104 of our Local

Rules of Practice. The Court is of the view, however, that this goes to the reasonableness of the attorney's fees in question, as opposed to Plaintiff's right to such an award.

Accordingly, the Court finds that Plaintiff is entitled to an award of reasonable attorney's fees pursuant to C.R.S. § 8-4-114, with respect to the $5,000.00 judgment in the instant case.

As noted above, the reasonableness of an award of attorney's fees under C.R.S. § 8-4-114 is within the discretion of the trial court. In the instant case, we are of the view that the amount requested by Plaintiff, $52,198.00, would not be a reasonable award of attorney's fees pursuant to C.R.S. § 8-4-114.

Although Plaintiff was technically the "winning party" in this action, in that the jury awarded the Plaintiff $5,000.00 in damages, it is necessary to keep in mind that the Plaintiff recovered on only one of several claims that he originally filed in this case. As noted above, a portion of Plaintiff's claims were dismissed on summary judgment, while others were rejected by the jury. The Court is of the opinion that the "proportionate recovery rule," traditionally applied in cases involving claims for attorney's fees under 28 U.S.C. § 1988, must also be applied to claims for attorney's fees under C.R.S. § 8-4-114. In *Scheriff v. Beck*, 452 F.Supp 1254 (D.Colo. 1978), the Court explained:

> [W]e recognize the rule in the Tenth Circuit that "when a party has prevailed in a court action . . . he may be entitled to attorney's fees proportionate to the extent of his recovery." *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1153 (10th Cir. 1976). (citations omitted) . . . Applying the proportionate recovery rule plaintiff's fee request must again be reduced. Plaintiff was permitted to present three separate civil rights claims to the jury and recovered only on one. Any recovery granted should take into account this disparity.

Id. at 1259. *See also Keyes v. School Dist. No. 1*, 439 F.Supp. 393 (D.Colo. 1977); *Perkins v. New Orleans Athletic Club*, 429 F.Supp. 661 (E.D.La. 1976). Accordingly, we are of the view that Plaintiff is not entitled to recovery of all of the attorney's fees incurred.

The Court also notes that any attorney's fees awarded under C.R.S. § 8-4-114 are to be "taxed as part of the costs of the action." *See* C.R.S. § 8-4-114. In this case, as will be discussed below, the award of costs may be affected by the offer of judgment submitted by Defendant under Rule 68 of the Federal Rules of Civil Procedure. Accordingly, any award of attorney's fees may be significantly reduced as a result of Defendant's offer of judgment.

In light of these factors, as well as the factors outlines in *Mau v. E.P.H. Corp.*, 638 P.2d 777 (Colo. 1981) and *Battle v. Anderson*, 614, F.2d 251 (10th Cir. 1980), the Court is of the opinion that the amount requested by the Plaintiff does not represent a "reasonable" amount of attorney's fees under C.R.S. § 8-4-114. As will be described below, Plaintiff will be permitted to submit the necessary documentation in order to support his claim for a reasonable award of attorney's fees in this case.

Both parties have moved this Court to review the taxation of costs by the Clerk of the Court. The amount of costs to be taxed in this case depends to a great extent, however, on the final resolution of Plaintiff's request for attorney's fees under C.R.S. § 8-4-114. Any attorneys fees awarded must be included in the costs taxed in this action. Furthermore, just as the offer of judgment in this case could reduce any award of attorney's fees, an award of attorney's fees could conceivably alter the role that the offer of judgment would normally play in the taxation of costs. Accordingly, the parties' motions to review taxation of casts will be HELD IN ABEYANCE pending a determination of a reasonable award of attorney's fees in this case.

The Court is of the view that the parties should be able to reach an agreement which would resolve the issues in this case which remain viable at this time. The Court is of the opinion that the interests of both parties would be well served if the parties could reach an agreement, in light of the factors cited above, as to a reasonable award of attorney's fees in this action. The added time, effort and expense which will be required to have this matter resolved by the Court, will most likely eliminate any benefit that either party could hope to receive from an award of costs or attorney's fees in this action. Accordingly, the parties are *DIRECTED* to make every effort to resolve this matter. The Court is to be advised, in writing, by 5:00 p.m. on May 30, 1984, regarding the results of the parties' efforts.

In the event that the parties are unable to resolve these matters, Plaintiff is *DIRECTED* to file with the Court, by 5:00 p.m. on June 6, 1984, a statement, together with all documents required by Rule 104 of our Local Rules of Practice, in support of his claim for *reasonable* attorney's fees. Plaintiff's statement should include, to the greatest extent possible, a discussion of the amount of fees, reasonably necessary to the recovery of the $5,000.00 judgment in this case, which were incurred before and after the filing of Defendant's offer of judgment. Defendant is *DIRECTED* to file a response to Plaintiff's statement by 5:00 p.m. on June 15, 1984. Unless otherwise ordered, the Court will rule on this matter without oral argument.

— ORDER —

For the reasons stated above, the Motion For New Trial, Amendment of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 2, 1984, is *DENIED*.

The Amended Motion For A New Trial, Amendment of Judgment, Relief From Judgment Or Order, filed by Plaintiff on

April 6, 1984, is *GRANTED* to the extent that Plaintiff is awarded prejudgment interest on the $5,000.00 judgment in this case, said interest to be calculated from February, 1982 until judgment entered in this case, at a rate of eight percent per annum compounded annually. Plaintiff's Amended Motion, in all other respects is *DENIED*.

The Motion For Attorney's Fees, Filed by Plaintiff on April 2, 1984, is *GRANTED* to the extent that Plaintiff is entitled to reasonable attorney's fees in this case. A determination of the amount of attorney's fees to be awarded will be *HELD IN ABEYANCE* pending completion of the briefing schedule outlined in this order.

The Motion To Review Taxation Of Costs filed by Plaintiff on April 13, 1984, and the Motion To Review Taxation Of Costs filed by Defendant on April 16, 1984, will be *HELD IN ABEYANCE* pending a determination of the amount of attorney's fees to be awarded in this case.

DATED at Denver, Colorado this 17th day of May, 1984.

BY THE COURT:

/s/ SHERMAN G. FINESILVER

Sherman G. Finesilver,
Chief Judge
United States District Court

APPENDIX II.D

ORDER OF JULY 3, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON & COMPANY,

Defendant.

— ORDER —

Sherman G. Finesilver, Chief Judge

PLAINTIFF originally brought this action seeking recovery of compensatory and punitive damages on the following theories of recovery: breach of contract, quantum meruit, misrepresentation and/or fraudulent conce .lment, and wrongful termination. On May 31, 1983, the Court granted in part and denied in part Defendant's motion for summary judgment, and dismissed Plaintiff's claims for breach of contract, wrongful termination, outrageous conduct, and quantum meruit on the original contract entered into by the parties. A trial on this matter was held commencing June 6, 1983. Said trial resulted in a mistrial. The matter proceeded to a retrial on March 19, 1984. A jury verdict was returned on March 23, 1984, in favor of the Defendant on Plaintiff's claims of fraudulent concealment and/or misrepresentation, and quantum meruit as to the sale of spare parts and accessories. The jury found in favor of the Plaintiff on his claim for quantum meruit as to the sale of 79 additional PVD units, and awarded the Plaintiff damages in the amount of $5,000.00. On May 14, 1984, the Court entered an order denying Plaintiff's motion for a new trial, amendment

of judgment, and relief from judgment or order. The Court granted in part and denied in part Plaintiff's amended motion for a new trial, amendment of judgment and relief from judgment or order, and awarded the Plaintiff prejudgment interest on the $5,000.00 judgment previously entered in this case. Plaintiff's motion for attorney's fees was granted to the extent that the Court found that Plaintiff is entitled to an award of reasonable attorney's fees; however, the Court held in abeyance a determination of the amount of attorney's fees to be awarded to the Plaintiff.

This matter is before the court on the following motions: (1) a motion for attorney's fees, filed by Plaintiff on April 2, 1984; (2) a motion to review taxation of costs, filed by Plaintiff on April 13, 1984; and (3) a motion to review taxation of costs, filed by Defendant on April 16, 1984. The Court has thoroughly reviewed these motions, as well as the briefs, affidavits and exhibits submitted by the parties in support of their respective positions on said motions. Upon a careful consideration of these matters, the Court finds that Plaintiff is entitled to an award of attorney's fees in the amount of $1,000.00, to be taxed as costs in the instant case. The Court further finds that Plaintiff is entitled to an award of costs in this case; however, said award will be limited by the offer of judgment filed by Defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Court expressly approves and upholds the method of taxation of costs and the amount of costs awarded to the Defendant by the Clerk of the Court on April 10, 1984.

Plaintiff originally requested an award of $52,198.00 in attorney's fees with respect to the $5,000.00 judgment entered in this case. This amount was apparently based on the attorney's fees incurred by the Plaintiff with respect to all of the claims for relief asserted by the Plaintiff in the instant case. In our May 14, 1984 order, the Court explained that in calculating the attorney's fees to be awarded in the instant case it is

necessary to consider that the Plaintiff recovered on only one of several claims that he originally asserted against the Defendant. A portion of Plaintiff's claims were dismissed on summary judgment, while others were rejected by the jury. Plaintiff's claim for attorney's fees obviously must be reduced to take into account these factors. *See e.g. Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976); *Scheriff v. Beck*, 452 F. Supp. 1254 (D.Colo. 1978).

Plaintiff, in response to the Court's May 14, 1984 order, submitted a claim for attorney's fees in the amount of $17,132.74, based on Plaintiff's estimate of the fees to be awarded under the "proportionate recovery" analysis described by the Court. In addition, Plaintiff submitted an alternative claim for $18,855.00 in attorney's fees based on a "hypothetical case basis" as the prevailing party on the claim for which judgment was entered in the amount of $5,000.00. The Court is of the view that Plaintiff's requests are unreasonable, and that Plaintiff should be awarded a total of $1,000.00 for reasonable attorney's fees in the instant case.

Initially, the Court notes that even if Plaintiff's request was considered reasonable, the request must be substantially reduced as a result of the offer of judgment filed by Defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure. As the Court explained in our May 14, 1984 order, any award of attorney's fees in this case must be taxed as costs, and come within the limitations of a valid offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. Defendants submitted an offer of judgment on February 15, 1984, in the amount of $27,000. Said offer was rejected by the Defendant, and the offer clearly exceeds the amount of judgment entered in this case together with the amount of costs (including the amount of attorney's fees sought by the Plaintiff) prior to the date the offer was made. Furthermore, the Court finds Plaintiff's arguments regarding the validity of the Defendant's

offer of judgment to be without merit. The Court has thoroughly reviewed Defendant's offer of judgment, and finds that it is sufficient to meet the requirements of Rule 68 of the Federal Rules of Civil Procedure. Therefore, the Court finds that Plaintiff is not entitled to an award of any costs which might have been incurred after February 15, 1984. Accordingly, Plaintiff is not entitled to an award for any attorney's fees incurred after February 15, 1984.

Plaintiff's request must be further reduced to accurately reflect the limited recovery achieved by the Plaintiff. As we have repeatedly noted, Plaintiff was the "prevailing party" in this case with respect to only one of several claims that he originally brought against the Defendant. In terms of the legal issues involved in Plaintiff's various claims, the discovery reasonably required for presentation of the claims, and the relief requested with respect to the Plaintiff's claims, the single claim upon which the Plaintiff ultimately prevailed was clearly the most limited in scope of all the Plaintiff's claims. Where a plaintiff has enjoyed only a limited success, a reasonable fee must be determined in relationship to the results obtained, and a reduced award is justified where the relief is limited in comparison to the scope of the litigation as a whole. *See Hensley v. Eckerhart,* 103 S.Ct. 1933 (1983).

Upon a review of the records submitted by the Plaintiff, the Court finds that the Plaintiff's request for attorney's fees contains claims for time, travel and discovery which were not necessary or related to the $5,000.00 judgment entered for the Plaintiff. The Court is not willing to require the Defendant to bear the burden of financing Plaintiff's largely unsuccessful lawsuit, particularly in light of the offer of judgment that was filed by Defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure. Furthermore, the Court is of the view that equitable considerations support an extremely limited award of attorney's fees in the instant case. The Defendant clearly prevailed on several claims in this case, and Defendant is

arguably a "prevailing party" entitled to an award of attorney's fees under C.R.S. § 8-4-114. *See e.g. Hartman v. Freedman,* 591 P.2d 1318 (1979). Although the Defendant did not file a motion for an award of attorney's fees in this case, and the Court makes no finding as to whether the Defendant would have been entitled to such an award, a realistic examination of which party actually "prevailed" in this case clearly suggests that the Plaintiff should receive at most an extremely limited award of attorney's fees.

In addition to the factors specifically discussed in this order, the Court, in determining the amount of attorney's fees to be awarded in this case, has considered the factors articulated in *Hensley v. Eckerhart, supra; Mau v. E.P.H. Corp.,* 638 P.2d 777 (Colo. 1981); and *Battle v. Anderson,* 614 F.2d 251 (10th Cir. 1980). Upon a consideration of the relevant factors, the Court finds that Plaintiff is entitled to an award of reasonable attorney's fees in the amount of $1,000.00, to be taxed as costs in the instant case.

— ORDER —

For the reasons stated above, Plaintiff's motion for attorney's fees is *GRANTED* to the extent that Plaintiff is awarded the amount of $1,000.00 in attorney's fees, to be taxed as costs in the instant case.

Defendant's motion to review taxation of costs is *DENIED.* The Court expressly approves and upholds the method of taxation of costs and the amount of costs awarded to the Defendant by the Clerk of the Court on April 10, 1984.

Plaintiff's motion to review taxation of costs is *GRANTED* to the extent that this matter is *REMANDED* to the Clerk of the Court for taxation of costs in accordance with this order.

DATED at Denver, Colorado this 3rd day of July, 1984.

BY THE COURT:

/s/ SHERMAN G. FINESILVER

SHERMAN G. FINESILVER,
Chief Judge
United States District Court

APPENDIX II.E

ORDER OF AUGUST 1, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs

BECTON DICKINSON & COMPANY

Defendant.

— ORDER —

SHERMAN G. FINESILVER, CHIEF JUDGE

THIS MATTER IS BEFORE THE COURT on the plaintiff's motion for amendment of order, or relief from judgment and order. Plaintiff seeks an increase in the amount of attorney's fees awarded to him by this Court's Order dated July 3, 1984. The gist of the motion is the Court's award of fees is unjust arbitrary, without factual and legal basis, and in the nature of a penalty. The Court has considered the plaintiff's motion. In addition, the Court has carefully reconsidered its Order of July 3, 1984. The award of fees was based on substantial evidence before the Court.

The July 3, 1984 Order takes into account the factors demanded under the applicable case law to be considered in an award of attorney's fees. *Mau v. E.P.H. Corp.*, 638 P.2d 777 (1981); *Battle v Anderson*, 614 F.2d 251 (10th Cir. 1890); *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983). Budinich prevailed on one of six claims brought, winning a $5,000 verdict out of $650,000 in damages originally sought. The plaintiff is entitled to a reasonable attorney's fee. In the Order, the Court

noted the claim upon which Budinich did prevail was the most limited in scope of all the claims. The claim was in no sense complex, either legally or factually. The Court further noted the plaintiff's very limited success, and found, in light of the scope of the litigation as a whole, a reduced award was indeed justified. *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983).

In addition to the above findings, the Court also found the request for fees contained time, travel and discovery which were neither necessary nor related to the judgment entered for Budinich. The Court found a valid offer of judgment had been made on February 15, 1984, by the defendant. The amount of the offer was $27,000. Although the Court awarded no fees to the Defendant, the Court did find the defendant was arguably a "prevailing party", noting a realistic examination of which party actually "prevailed" suggested the plaintiff should receive at most an extremely limited award of fees.

The Court is not insensitive to the purposes behind C.R.S. § 8-4-114. However, as states in the July 3 Order, the Court is unwilling to require the defendant to finance a largely unsuccessful lawsuit against itself. Accordingly, the plaintiff's motion for amendment of order, or relief from judgment and order is *DENIED*.

Dated at Denver, Colorado, this 1st day of August, 1984.

BY THE COURT:

/s/ SHERMAN G. FINESILVER

SHERMAN G. FINESILVER,
Chief Judge
United States District Court

APPENDIX III.A

PETITION FOR REHEARING FILED IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 84-2192

JOSEPH G. BUDINICH,
Plaintiff-Appellant,

vs.

BECTON DICKINSON AND COMPANY,
Defendant-Appellee.

PETITION FOR REHEARING

Appellant, Joseph G. Budinich, through the undersigned legal counsel, Frank & Finger, P.C., hereby petitions pursuant to Rule 40 of the Federal Rules of Appellate Procedure for rehearing of this Court's Judgment entered December 12, 1986.

Appellant requests that the Court reconsider and determine the issues of timeliness of this appeal, non-retroactivity, and the award of attorney fees for the reasons set forth herein.

Additionally, Appellant would note that an error appears in the recitation of facts in that the opinion erroneously states that the pleading were amended after Summary Judgment entered. This is not accurate. Amendment occurred prior to Summary Judgment.

I.

THE COURT'S HOLDING ON TIMELINESS OF THE APPEAL SHOULD BE MODIFIED

The Court's holding that a uniform, unqualified rule that attorney fee awards are collateral to the relief obtained is

appropriate in cases where federal law controls, but is inappropriate in pure diversity cases, where substantive state law controls and is contrary to the federal law.

The Constitution of the United States established a rigid balance between the rights granted to the federal government and those rights retained by the states. In that regard, the Tenth Amendment to the United States Constitution specifically reserved unto the states all power not delegated to the United States by the Constitution.

The right of the states to enact their own substantive standards has been repeatedly upheld. Only where such law directly interferes or transgresses on the Commerce Clause or areas expressly preempted have such laws been held to be superseded by Congressional mandate. *United States v. Darby,* 312 U.S. 100, 85 L.Ed. 609, 61 S. Ct. 451 (1941).

Colorado, in providing for labor relations in its state enacted a statute requiring payment of wages on discharge and specifically provided for an award of mandatory attorney fees for violation of that proscription. By case law of the State of Colorado this provision has been determined to be an inherent part of the relief where the statute is violated. *Ortega v. Board County Commissioners,* 657 P.2d 989 (Colo. App. 1982 *cert. denied*); *Ball Corporation v. Loran,* 42 Colo. App. 401, 496 P.2d 412 (Colo. App., 1979); *Marieta v. Busto,* 91 P.2d 345 (Colo. App., 1984) *cert. denied.*

The federal judiciary has no power to modify, change or reverse this substantive determination, unless the holding is unconstitutional or preempted. No such argument of unconstitutionality or preemption is made here.

Clearly, the provision providing for United States District Court's original jurisdiction over diversity actions, 28 U.S.C. § 1332, which in and of itself does not emanate from the United States Constitution, cannot preempt Colorado substantive law. *Kline v. Burke Construction Co.,* 260 U.S. 226, 67 L.Ed. 226, 43 S. Ct. 79 (1922).

Yet, that is exactly what this Court has done in its December 12, 1986 order. It has substantively changed the law of the State of Colorado. That procedure is violative of fundamental Constitutional principles and a marked departure from the teachings of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) and even *Hanna v. Plumer,* 380 U.S. 460 (1965). The determination is most certainly "*outcome determinative*" and clearly a new pronouncement of law.

II.

THE DECISION SHOULD BE GIVEN ONLY PROSPECTIVE APPLICATION

The December 12, 1986 decision of the Court is a new determination of the law. For the first time in this Circuit or any other circuit to Appellant's knowledge has a court grappled with the concept of whether state substantive law on attorney fees controls in diversity cases, and its import to the teachings of *White v. New Hampshire,* 455 U.S. 445 (1982).

Non-retroactivity is clearly inappropriate in this matter for the reasons previously set forth in Appellant's prior brief.

III.

THE ATTORNEY FEE AWARD REQUIRES FURTHER EXAMINATION

In disposing of the attorney fee award question, as it did, this Court failed to perceive that briefs on the merits have not been filed or authorized. The only issues briefed and submitted to the Court were briefs on the merits of the question of summary disposition based on jurisdictional arguments.

The District Court's decision on attorney fees is clearly erroneous. Facts and critical determinations, such as number of hours worked on the claim, hourly rate, defendant engaging in extensive discovery and the like, have never been presented because of the posture of the case. The Court, in its holding that the attorney fee question is properly before it, now should examine the merits.

Appellant asks only for fundamental fairness in presenting the issues to the Court. The $1,000.00 attorney fee award is far less compensation than is justified by any objective standard relating to time expense in proving the wage claim for the supplemental order.

An examination of the record with brief will easily clarify the erroneous attorney fee holding.

IV.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant requests rehearing and modification of this Court's order of December 12, 1986, and specifically asks this Court to consider the appeal in its entirety on the merits.

Respectfully submitted,
FRANK & FINGER, P.C.

By: /s/ WILLIAM S. FINGER

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